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Supreme Court of the United States

October Term, 1995

ENVIRONMENTAL COALITION OF OJAI, AN UNINCORPORATED ASSOCIATION OF HOMEOWNERS AND OJAI CITIZENS; LARRY M. HAGMAN; DAVID E. HEDMAN,

Petitioners,

vs.

RONALD H. BROWN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE DEPARTMENT OF COMMERCE; WILLIAM PERRY IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE; FEDERICO PENA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; ROBERT BROWN, IN HIS OFFICIAL CAPACITY AS DIRECTOR, JOINT SYSTEM PROGRAM OFFICE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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68 p.

QUESTIONS PRESENTED

1. May respondents intentionally circumvent the notice and public involvement policies of NEPA?

2. May respondents intentionally circumvent NEPA'S policies to cooperate and consult with local governments to the fullest extent possible?

3. Did respondents act arbitrarily to prepare a site specific enviromental impact statement?

4. Did respondents act arbitrarily and capriciously in failing to prepare a supplemental environmental impact statement instead of a FONSI?

PARTIES TO THE PROCEEDINGS

Plaintiffs and Appellants, Larry M. Hagman and David E. Hedman and the Environmental Coalition of Ojai, an unincorporated association of homeowners and Ojai citizens, brought the instant action for injunctive and declaratory relief pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA") and the attendant regulations by the Council on Environmental Quality ("CEQ") found at 40 C.F.R. § 1501, *et seq.* (the "Regulations") with regard to the subject program.

Defendants and Respondents, the Departments of Commerce ("Commerce"), Defense ("Defense"), and Transportation ("Transportation") have the responsibility for complying with NEPA with regard to the subject program.

Defendant and Respondent, Joint System Program Office ("JSPO"), has the responsibility of installing the program components and complying with NEPA and the Regulations.

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The Environmental Coalition of Ojai, an Unincorporated Association of Homeowners and Ojai Citizens; Larry M. Hagman; David E. Hedman, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the granting of a summary judgment motion against petitioners' complaint for a declaration that the government's actions violated the National Environmental Policy Act (NEPA).

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-18a, *infra*) is to be reported. 72 F.3d 1411 (9th Cir. 1996). The finding of the District Court (App. 19a) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's granting of respondent's summary judgment motion. The opinion of the court of appeals was filed December 29, 1995. (App. 1a). Accordingly, this petition is timely under Rule 13 of the United States Supreme Court rules. The jurisdiction of this court is invoked under United States Supreme Court Rules, 10(c), a United States Court of Appeals has decided an important question of law that has not been, but should be, decided by this Court.

STATUTES AND REGULATIONS INVOLVED

NEPA's regulatory scheme set out in the Code of Federal Regulations 40 C.F.R. §§ 1502.1, 1506.2 and 1506.6; and the United States Code, 42 U.S.C. §§ 4331 and 4332.

STATEMENT OF THE CASE

A. Federal Jurisdiction in the Court of First Instance

Jurisdiction in the United States District Court was based upon 5 U.S.C. § 702, 28 U.S.C. §§ 2201-2202, 1331, 28 U.S.C. § 1391(e) and 5 U.S.C. § 703, which involve federal questions which arise under the Constitution and laws of the United States as well as National Environmental Policy Act of 1969, 42 U.S.C. Section 4321, *et seq.*

B. The Program

The program consists of a nationally installed radar system. The program is for the primary benefit of the National Weather Service (NWS). It consists of a doppler radar system which is known as the next generation weather radar and/or the WSR-88D system ("NEXRAD").

In 1978, Respondents began a program to develop NEXRAD. NEXRAD consists of approximately 145 microwave radar units distributed across the United States.

The purpose of NEXRAD is to acquire, process, and distribute radar weather information. The typical site for the NEXRAD system has a radar antenna tower, several equipment buildings to house a transmitter and receiver, utility lines, and an access road. The radar antenna is enclosed in a spherical radome approximately 10 meters in diameter which is mounted on a tower that is up to 30 meters tall. The radar antenna rotates within the sphere and transmits a pulsed radar signal in the frequency range of 2700 to 3000 MHz.

The radar signal also emits radio frequency radiation ("RFR"), which at certain levels has been determined to be hazardous to human health.

This is also known as microwave radiation and is the same non-ionizing frequency range utilized in microwave ovens. As RFR enters a body it has a thermal effect, causing the body to heat up. If the body heats up faster than it can dissipate the heat, then adverse health effects, including death, occur.

It has also been determined that RFR can have "nonthermal" health effects. Numerous scientific studies conclude that there is a connection between this type of RFR and cancer, heart disease, Downs Syndrome, and other diseases and illnesses.

C. The Program's Procedural History

The National Oceanic and Atmospheric Administration (NOAA) conducted a comprehensive tiered analysis of potential environmental impacts of the Next Generation Weather Radar (NEXRAD) program. At a national level, the NOAA prepared a Programmatic Environmental Impact Statement (PEIS), which examined the impact of the radio frequency radiation (RFR) emitted by NEXRAD systems. The PEIS concluded that there was no reliable scientific evidence that RFR from the systems would be harmful to the health of the population. The Joint System Program Office (JSPO) issued a Draft Supplemental Environmental Assessment (SEA) that reviewed RFR studies conducted after the 1984 PEIS was issued. The JSPO issued a final SEA concluding that implementation of NEXRAD would cause no significant adverse impacts on human health or electronic systems. Based on the SEA, the JSPO elected not to conduct a supplemental environmental impact statement (SEIS). The government issued a finding of no significant impact (FONSI).

Sulphur Mountain in Ojai, California had been selected as a site for a NEXRAD doppler radar weather station. The NOAA issued a Preliminary Site Survey (PSS) for Sulphur Mountain

which included an initial EA of the potential environmental impacts of a system on the area's resources. The NOAA issued an In-depth Site Survey (ISS) for the Sulphur Mountain NEXRAD site. In 1989, the NOAA issued a FONSI with respect to the site based on the 1984 PEIS, the 1986 PSS, and the 1987 ISS.

After construction of the Sulphur Mountain project began, appellants the Environmental Coalition of Ojai and others (collectively, the Coalition) filed a complaint seeking a judicial declaration that the government's environmental analysis of its Sulphur Mountain NEXRAD project violated the National Environmental Policy Act of 1969 (NEPA). The complaint also sought to enjoin the further construction and operation of the project pending the government's preparation of an EIS. The district court denied the Coalition's request for a preliminary injunction. After the court granted summary judgment in favor of the government, the Coalition appealed.

The United States Court of Appeals for the Ninth Circuit affirmed the lower court ruling. It is from this affirmation that this petition is being presented.

D. Respondents' Procedures Under NEPA

On August 4, 1983, Respondents published in the Federal Register a notice entitled "Announcing Intent To Prepare a Programmatic Environmental Impact Statement/Announcement of Scoping Meeting, Next Generation Weather Radar" ("PEIS").

In December, 1984, respondents finalized the PEIS. The site that ultimately ended up in Ojai was only identified as a site for Los Angeles. Additionally, although the PEI is a foundation of the environmental process, the sites at which the radars would be located had not been selected when the PEIS was written.

Respondents registered their Record of Decision ("ROD"), for the final PEIS and the Federal Register in November, 1985.

In or about 1986, the Department of Commerce completed the NEXRAD Preliminary Site Survey ("PSS") for the Los Angeles area. In or about 1987, the Department of Commerce issued the NEXRAD In-Depth Site Survey ("ISS") report for the Los Angeles area. This ISS was updated in April, 1993. In January, 1989, the National Oceanic and Atmospheric Administration ("NOAA"), a division of the Department of Commerce, issued a FONSI after allegedly assessing the site-specific environmental impact of the project on the Ojai, Sulphur Mountain site. The notice of this FONSI was sent to the California State Office of Planning and Research and the Southern California Association of Governments.

After publication of the PEIS and prior to the initiation of construction of the project, new research concerning the negative biological effects of RFR became known. This new information could have negatively changed the conclusions of the PEIS.

As a result, a draft and then a final Supplemental Environmental Assessment ("SEA") was published. The SEA allegedly reviewed many studies relating to harmful radio frequency radiation bio-effects that had been conducted since the 1984 PEIS. (Not one medical/health professional was listed as a preparer of this document.)

In April, 1993, the final SEA was issued confirming the conclusion that the implementation of the microwave radar system would not cause significant impacts on the human environment. A finding of no significant impact was warranted. A 1993 FONSI based on the SEA and a Notice of Availability was published in the Federal Register on July 15, 1993.

No citizens of Ojai or organizations therein received any information, knowledge or notice of the above. Petitioners' first knowledge of the project was on or about November 15, 1993, when Petitioners' observed construction activities commencing at the site. The initial lawsuit was filed approximately 60 days thereafter.

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals in this case appears to be the first reported decision involving 40 C.F.R. § 1506.6 which describes the public involvement policies of NEPA.

We are aware of no cases looking into actions by federal governmental agencies intentionally designed to exclude the public and local governments from NEPA actions.

This writ brings forth both issues for the first time.

I.

THE STANDARD FOR APPELLATE REVIEW

The Motion for Summary Judgment is reviewed *de novo*. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir 1995). The trial court should act with caution in granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This Court must determine, viewing the evidence in the light most favorable to the non-moving party, whether there were any genuine issues of material fact, whether the District Court correctly applied the relevant substantive law. *Warren*, 58 F.3d at 441.

II.

MAY RESPONDENTS INTENTIONALLY CIRCUMVENT THE NOTICE AND PUBLIC INVOLVEMENT POLICIES OF NEPA?

NEPA is intended by Congress to be an "action-forcing" statute providing for a process to force public officials to make decisions based on an understanding of environmental consequences and public input. *Oregon Environmental Council v. Kunzman*, 817 F.2d 44, 492 (9th Cir. 1987).

"NEPA prohibits unformed . . . agency action". *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). The primary action/forcing tool of NEPA is the congressional requirement that federal agencies comply with the policies of NEPA to the "fullest extent possible". 42 U.S.C. § 4332. NEPA procedures are set forth in the Council on Environmental Quality ("CEQ") regulations.

NEPA requires federal agencies undertaking "major federal actions" which are likely to "significantly effect the human environment" to take a "hard look at the environmental effect of the proposed project by preparing an EIS. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). These procedures are designed to:

> . . . provide full and fair discussion of significant environmental impacts and *shall inform decision makers and the public* of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

40 C.F.R. § 1502.1 (emphasis added).

The EIS is not just a document, it is a process. It forces the government to police itself, by taking a "hard look" at the environmental impact of its proposed actions. The "hard look" requirement necessarily includes public involvement in the process.

NEPA's primary goal is to facilitate "widespread discussion and consideration of the environmental risks and remedies associated with impending federal project", thereby augmenting an informed decision-making process. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980). Opportunity for local citizens or other interested parties to participate in preparation of the environmental analysis is mandatory under NEPA. *Colony Federal Sav. and Loan Assn. v. Harris*, 482 F. Supp. 296 (D.C. Pa. 1980). This widespread discussion and evaluation must take place before a project is approved. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979).

The policy of public involvement is specifically implemented in 40 C.F.R. § 1506.6 which states:

> Agencies shall:
>
> (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
>
> (b) Provide public notice of NEPA related hearings, public meetings and the availability of environmental documents so as to inform those person and agencies who may be interested or affected.
>
> (1) In all cases the agency shall mail notice to those who have requested it. . . .

(2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter

(3) In the case of an action with effects primarily of local concern, the notice may include:

(i) Notice to State and areawide clearinghouses. . . .

(iii) Following the affected States public notice procedures for comparable actions.

(iv) Publication in local newspapers . . . (papers of general circulation rather than legal papers).

(v) Notice through other local media.

(v) Notice to potentially interested community organizations. . . including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

> (ix) Posting of notice on and off-site in the area where the action is to be located.
>
> (c) Hold or sponsor public hearings or public meetings whenever . . . there is: (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.
>
> * * *
>
> (d) Solicit appropriate information from the public.
>
> (e) Explain in its procedures where interested persons can get information or status reports on EIS's.
>
> * * *

40 C.F.R. § 1506.6

Publication in the Federal Register and notice to state-wide clearinghouses was all that was done. Why? We suggest respondents intentionally avoided involving the public, thus violating the policies of NEPA and the ethics of government. Doesn't this present a triable issue of fact and law?

III.

MAY RESPONDENTS INTENTIONALLY CIRCUMVENT NEPA'S POLICIES TO COOPERATE AND CONSULT WITH LOCAL GOVERNMENTS TO THE FULLEST EXTENT POSSIBLE?

A. The Federal Government Has an Obligation to Give Consideration to Local Government Regulations and Concerns.

The requirement that the federal government consult and cooperate with local government, and give consideration to local land use requirements, appears throughout NEPA's statutory and regulatory scheme.

Congress has declared a national environmental policy of the federal government to *cooperate* with state and *local governments*, and to use all practicable means and measures to preserve and enhance the environment in carrying out federal projects. (42 U.S.C. § 4331.) Cooperation between federal and local government shall include, among other things, joint planning processes and joint public hearings. (40 C.F.R. Section 1506.2(b).)

Public hearings must be held where there is substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing. (40 C.F.R. Section 1506.6(c). *See also LaFlamme v. F.E.R.C.*, 857 F.2d 389, 400 - 401 (9th Cir. 1988).

NEPA mandates that federal agencies consider the comments and views of local agencies. 42 U.S.C. § 4332(2)(c):

The foregoing establishes that respondents

> had the responsibility to duly consider local government and citizen input before installing the NEXRAD radar tower on Sulphur Mountain. NEPA requires that the federal government interpret and administer the foregoing policies "to the fullest extent possible." (42 U.S.C. Section 4332; 40 C.F.R. Section 1506.2.) The facts discussed below demonstrate that respondents failed in this duty.

The blatant lack of notice to the effected public violated the precepts of NEPA to facilitate widespread discussion and consideration of environmental concerns. This action was intentionally done in order to avoid the problems that occurred in New York State prior to the Ojai radar installation. There, several sites were discovered by the public and the outcry which ensued caused those sites to be moved to different locations. Additionally, the Ventura County Board of Supervisors unanimously passed a resolution stating that respondents materially misrepresented the nature of this project to them. (App. 20a-25a) When one combines the above with respondents' consistent failure to notify and involve the public, it can be seen that there is a genuine issue of fact as to whether or not these acts were intentional.

This "stealth" approach to public involvement rendered a "hard look" impossible.

B. Respondents Did Not Provide the Level of Communication and Consultation With the County That Is Contemplated by NEPA.

The Board of Supervisors is the body to whom respondents were required to give notice. That body produced sworn

testimony that proper notice was *not* given. On summary judgment, inferences to be drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. (*United States v. Diebold, Incorporated,* 369 U.S. 654, 82 S. Ct. 993 (1962)). Where such inferences are in dispute, as here, summary judgment is inappropriate. (*Benton-Volvo-Metairie, Inc., v. Volvo Southwest, Inc.,* 479 F.2d 135, 138 (5th Cir. 1973)).

Contrary to NEPA's requirements and policies, there was no harmonization of local and federal action (42 U.S.C. § 4331); no meaningful attempt to cooperate with Ventura County's Planning Division (42 U.S.C. § 4331; 40 C.F.R. § 1506.2); no joint planning processes or joint public hearings (40 C.F.R. § 1506.2(b)).

Respondents failed to meet their burden of establishing compliance with NEPA's requirements for local involvement and, therefore, summary judgment was improper. (*See Adickes v. S.H. Kress and Company* 398 U.S. 144, 157 (1970)).

IV.

DID RESPONDENTS ACT ARBITRARILY AND CAPRICIOUSLY IN FAILING TO PREPARE A SITE SPECIFIC ENVIRONMENTAL IMPACT STATEMENT?

By its terms, NEPA mandates the preparation of an EIS for all "major federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(c). The phrase "actions significantly affecting the quality of the human environment" is intentionally broad, reflecting NEPA's attempt to promote an across the board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency. *Scientists' Institute for Public*

Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

> 40 C.F.R. § 1508.27(b) states in part that the following factors should be considered . . . .
>
> > (2) the degree which the proposed action affects public health or safety;
> >
> > * * *
> >
> > (4) the degree to which the affects on the quality of the human environment are likely to be highly controversial;
> >
> > * * *
> >
> > (5) the degree to which the possible affects on the human environment are highly uncertain or involve unique or unknown risks;
> >
> > * * *
> >
> > (7) whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

In the 1989 FONSI (a FONSI precludes the need for an EIS), the respondents did not file site specific information since the Sulphur Mountain Ojai site was not yet determined. When the final FONSI was prepared in 1993, it was decided not to prepare a site-specific statement. This failed to give adequate consideration to newly discovered project-specific factors as

required by *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 836-37 (D.D.C. 1974).

The failure to prepare a site-specific EIS resulted in the exclusion of the public from the decision-making process, thereby again showing intentional actions on the part of respondents to violate the policies of NEPA. All of the factors listed above in 40 C.F.R. § 1508.27(b) were involved. Essentially the respondents created the functional equivalent of an EIS, but called it a FONSI. This was intentionally done and thus there existed legitimate issues of law and fact.

V.

DID RESPONDENTS ACT ARBITRARILY AND CAPRICIOUSLY IN FAILING TO PREPARE A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT INSTEAD OF A FONSI?

After publication of a PEIS and prior to initiation of construction of the Project, new research concerning the negative biological effects of RFR became known. These circumstances required Respondents to take a "hard look" to determine whether an SEIS was required. 40 C.F.R. § 1508.27(b) requires Respondents to look at whether (1) the proposed action affected human health; (2) the degree to which a controversy relating to the health effects existed; and (3) the degree of uncertainty relating to the human health risks.

In 1990, residents of the State of New York caused the Respondents to move potential sites of these radar towers due to controversy over the health affects of such microwave radiation.

In *Southern Oregon Citizens v. Clark*, 720 F.2d 1475, 1481, the court stated:

> We start with the premise that a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. (Citations omitted.) This continuing duty is especially relevant where the original EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed.

Since respondents had not complied with the notice and public involvement policies of NEPA, the respondents intentionally remained ignorant of the new scientific information and the blossoming controversy. The existence of a controversy is a significant factor in determining whether the federal agency should prepare an EIS. 40 C.F.R. § 1508.27(b)(4); *Jones v. Gordon*, 792 F.2d 821, 828-29 (1986).

Respondents' SEA admits such a scientific controversy when it stated: "In principle, the new research on EMR bio-effects and changes in WSR-88D design could change the conclusions of the PEIS." Furthermore, a new standard was promulgated for exposure to pulse RFR radiation in 1991. Since this was the first time a pulse standard was established, it was not even discussed in the 1984 original PEIS. Further, the Environmental Protection Agency has stated that these same standards were flawed because they did not address the "non-thermal effects of microwave radiation".

In this case, significant questions raised by scientists were ignored or shunted aside.

The very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly effect the environment is to obviate the need for such speculation by

ensuring that available data is gathered and analyzed prior to the implement of the proposed action. *See Columbia Basin Lane Protection Association (ASSN) v. Schlesinger,* 643 F.2d 59, 63 (10th Cir. 1978). Speculation abounds not only regarding the health risks but also as to the apparently intentional exclusion from this process of the public and local governments.

CONCLUSION

If this Court were to conclude that the respondents can mislead local governmental elected body; ignore the requirements of NEPA and circumvent any and all notice and public involvement policies, then this Court will in essence determine that a "hard look" need only be superficial, not one in reality that complies with the policies of NEPA and the common sense notion of "good faith". In other words, an agency of the federal government can act with the ethics of a used car salesman.

It is for the above reasons that it is requested that this Court grant the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 29, 1995

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ENVIRONMENTAL COALITION OF OJAI, an Unincorporated Association of Homeowners and Ojai Citizens; LARRY M. HAGMAN; DAVID E. HEDMAN,

Plaintiffs-Appellants,

v.

RONALD H. BROWN, in his official capacity as the Secretary of the Department of Commerce; WILLIAM PERRY* in his official capacity as Secretary of Defense; FEDERICO PENA, in his official capacity as Secretary of Transportation; ROBERT BROWN, in his official capacity as Director, Joint System Program Office,

Defendants-Appellees.

No. 94-56164

D.C. No. CV-94-00164-TJH

OPINION

Appeal from the United States District Court for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
December 14, 1995—Pasadena, California

Filed December 29, 1995

*William Perry is substituted for Les Aspin, former Secretary of Defense, pursuant to FRAP 43(c)(1).

Appendix A

Before: Ruggero J. Aldisert,** Arthur L. Alarcon, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

**Environmental Law/
Environmental Documents (EIR and EIS)/
Administrative Law**

The court of appeals affirmed a district court order. The court held that the government's decision, based on its site-specific Environmental Assessments (EAs) that considered the environmental impact of weather radar installation on a mountain, not to prepare a site-specific Environmental Impact Statement (EIS) was not arbitrary and capricious.

The National Oceanic and Atmospheric Administration (NOAA) conducted a comprehensive tiered analysis of potential environmental impacts of the Next Generation Weather Radar (NEXRAD) program. At a national level, the NOAA prepared a programmatic Environmental Impact Statement (PEIS), which examined the impact of the radio frequency radiation (RFR) emitted by NEXRAD systems. The PEIS concluded that there was no reliable scientific evidence that RFR from the systems would be harmful to the health of the population. The Joint System Program Office (JSPO) issued a Draft Supplemental Environmental Assessment (SEA) that reviewed RFR studies conducted after the 1984 PEIS was issued. The JSPO issued a final SEA concluding that implementation of NEXRAD would cause no significant adverse impacts on human health or electronic systems. Based on the

**Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

SEA, the JSPO elected not to conduct a supplemental environmental impact statement (SEIS). The government issued a finding of no significant impact (FONSI).

Sulphur Mountain in Ojai, California had been selected as a site for a NEXRAD doppler radar weather station. The NOAA issued a Preliminary Site Survey (PSS) for Sulphur Mountain which included an initial EA of the potential environmental impacts of a system on the area's resources. The NOAA issued an In-depth Site Survey (ISS) for the Sulphur Mountain NEXRAD site. In 1989, the NOAA issued a FONSI with respect to the site based on the 1984 PEIS, the 1986 PSS, and the 1987 ISS.

After construction of the Sulphur Mountain project began, appellants the Environmental Coalition of Ojai and others (collectively, the Coalition) filed a complaint seeking a judicial declaration that the government's environmental analysis of its Sulphur Mountain NEXRAD project violated the National Environmental Policy Act of 1969 (NEPA). The complaint also sought to enjoin the further construction and operation of the project pending the government's preparation of an EIS. The district court denied the Coalition's request for a preliminary injunction. After the court granted summary judgment in favor of the government, the Coalition appealed.

[1] NEXRAD contains both national and local components. The government's notice of the 1984 PEIS, the 1993 SEA, and the 1993 FONSI had to be reviewed under the notice standard developed for matters of national concern. On the other hand, the government's notice of the 1989 FONSI had to be reviewed under the notice standard developed for matters of local concern.

[2] For matters of national concern, the Council on Environmental Quality (CEQ) regulations mandate notice in the Federal Register and mailed notice to interested national organizations. The government did not have a duty to provide

additional notice to Ojai citizens. Thus, the government gave adequate notice of the 1984 PEIS, 1993 SEA, and 1993 FONSI.

[3] While the CEQ regulations mandate public notice in matters of local concern, they do not mandate a particular *form* of notice. [4] In this case, the government gave notice of the 1989 FONSI by filing it with state and local clearinghouses as provided for in part of a relevant regulation. [5] In matters of local concern, NEPA's public notice requirement is satisfied by utilizing any one of the methods listed in the regulation. Thus, the government gave adequate notice of the 1989 FONSI.

[6] The government fully compiled with NEPA by conducting an EA on the Sulphur Mountain site. The government complied with NEPA's requirement that it consider the site-specific impact of the NEXRAD installation on Sulphur Mountain's flora and fauna. [7] In addition, the government addressed the possible effects of the construction on the mountain's historic, cultural, and archaeological sites in the site-specific EA. [8] The government also found in the site-specific EA that the radome was not expected to have a negative effect on the area's visual quality. [9] And, the government considered the question of "additive RFR" in its SEA. [10] Thus, there was no merit to the Coalition's claim that the government violated NEPA by failing to prepare a site-specific EIS in relation to any site-specific problems raised by installing NEXRAD on the mountain; the Coalition overlooked the ISS, PSS, and accompanying EAs. [11] The government's decision, based on the site-specific EAs, not to prepare a site-specific EIS was not arbitrary and capricious. Having determined that the Sulphur Mountain NEXRAD installation would have no significant local environmental impact, the government reasonably issued a FONSI in 1989 instead of preparing a site-specific EIS.

[12] Because the record demonstrated that the government thoroughly evaluated recent scientific developments regarding

the health impact of RFR, the government acted within NEPA's dictates in concluding that supplementation was unnecessary.

COUNSEL

Dale G. Givner, Oxnard, California, for the plaintiffs-appellants.

Patrick J. Walsh (argued), Assistant United States Attorney and Donna J. Everett (on the briefs), Assistant United States Attorney, Los Angeles, California, for the defendants-appellees.

Lori A. Nemiroff, Assistant County Counsel, Ventura, California, for amici curiae County of Ventura and United States Congressman Elton Gallegly; Richard McKee and Katharina Richter, Pima County, Tucson, Arizona, for amicus Pima County, Arizona.

OPINION

ALARCON, Circuit Judge:

The Environmental Coalition of Ojai and others (collectively the "Coalition") appeal from the district court's order granting summary judgment in favor of the Secretaries of Commerce, Defense and Transportation and the Director of the Joint System Program Office ("JSPO") (collectively the "Government") in the Coalition's action for declaratory and injunctive relief. The Coalition sought a judicial declaration that the Government violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, et seq., and an injunction enjoining the further construction and operation of the Doppler Radar Weather Station project on Sulphur Mountain in Ojai, California.

Appendix A

We affirm because we conclude that the Government complied with NEPA.

I.

Pursuant to the Weather Service Modernization Act, the National Weather System is modernizing its forecasting technology. Part of this modernization includes the construction of numerous Next Generation Weather Radar ("NEXRAD") systems throughout the country.[1] To date, 55 systems have been constructed and are currently being operated. As is required by NEPA, the National Oceanic and Atmospheric Administration ("NOAA") conducted a comprehensive tiered[2] analysis of the potential environmental impacts of the NEXRAD program.

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[1]NEXRAD is a tri-agency project between the National Weather Service, the Federal Aviation Administration, and the Department of Defense using Doppler radar, which must be located away from electronic pollution found in metropolitan areas. NEXRAD is a sophisticated radar system that can detect more precisely than current weather systems the relative motion of air masses and water droplets within storms.

[2]*See* 40 C.F.R. § 1502.20 stating in relevant part that:

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

Appendix A

At a national level, NOAA prepared a programmatic Environmental Impact Statement ("PEIS") which examined program-wide environmental issues raised by NEXRAD. In particular, the PEIS examined the impact of the radio frequency radiation ("RFR") emitted by the NEXRAD systems. The PEIS concluded that there was no reliable scientific evidence that RFR from the NEXRAD systems would be harmful to the health of the population. In March 1993, the JSPO issued a Draft Supplemental Environmental Assessment ("SEA") which reviewed RFR studies conducted after the 1984 PEIS was issued. In April 1993, the JSPO issued a final SEA concluding that the implementation of NEXRAD would cause no significant adverse impacts on human health or electronic systems. In developing the SEA, NOAA and JSPO interacted with the Environmental Protection Agency to ensure that the SEA would be scientifically accurate. Based on the SEA, the JSPO elected not to conduct a supplemental environmental impact statement ("SEIS"). The Government then issued a finding of no significant impact ("FONSI") in 1993.

Sulphur Mountain in Ojai, California was selected by the Government as a site for a NEXRAD doppler radar weather station. In April of 1986, NOAA issued a Preliminary Site Survey ("PSS") for Sulphur Mountain which included an initial Environmental Assessment ("EA") of the potential environmental impacts of a NEXRAD system on the resources in the area. In August of 1987, NOAA issued an In-depth Site Survey ("ISS") for the Sulphur Mountain NEXRAD site further assessing environmental impact. On January 29, 1989, NOAA issued a FONSI with respect to the Sulphur Mountain site based on the 1984 PEIS, the 1986 PSS, and 1987 ISS.

Construction of the Sulphur Mountain project commenced in 1993. On January 7, 1994, the Coalition, an association of Ojai citizens and homeowners, filed a complaint seeking a judicial declaration that the Government's environmental analysis of its Sulphur Mountain NEXRAD project violated

NEPA. The complaint also sought to enjoin the further construction and operation of the NEXRAD project pending the Government's preparation of an EIS. The Complaint was accompanied by a request for a temporary restraining order ("TRO"), which the district court denied without a hearing. After a hearing on February 4, 1994, the district court also denied the Coalition's request for a preliminary injunction. The Government then moved for summary judgment on all claims for relief raised in the Coalition's complaint. The district court granted summary judgment in favor of the Government. The Coalition timely appeals from this order.

While the appeal was pending, the NEXRAD project at Sulphur Mountain was completed and is now fully operational.

II.

We review *de novo* a district court's grant of summary judgment. *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir. 1995). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Judicial review of agency action is limited to review of the administrative record. 5 U.S.C. § 706; *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1436 (9th Cir. 1989). Because NEPA is essentially a procedural statute, an agency's actions under NEPA are generally reviewed to determine if the agency observed the appropriate procedural requirements. *LaFlamme v. F.E.R.C.,* 852 F.2d 389, 399 (9th Cir. 1988) (citing 5 U.S.C. § 706(2)(D)). Substantive NEPA decisions by the agency are reviewed under the arbitrary and capricious standard. *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 376-377 (1989) (whether the agency need conduct an EIS is reviewed under arbitrary and capricious standard). Under the arbitrary and capricious standard, this court

will only overturn an agency's decision if the agency committed a "clear error of judgment." *California Trout v. Schaefer*, 58 F.3d 469, 473 (9th Cir. 1995).[3]

A.

The Coalition argues that the Government failed to comply with NEPA because it did not give the residents of Ojai adequate notice of: (1) the 1984 PEIS; (2) the 1993 SEA; (3) the 1989 FONSI for Sulphur Mountain; and (4) the 1993 FONSI for the entire NEXRAD program.

NEPA procedures are set forth in the Council on Environmental Quality ("CEQ") regulations. These procedures are designed to "[e]ncourage and facilitate public involvement" in projects which affect the environment. 40 C.F.R. § 1500.2(d). The procedures for public notice are set forth in 40 C.F.R. § 1506.6 which provides:

> Agencies shall:
>
> (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
>
> (b) Provide public notice of NEPA related hearings, public meetings and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

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[3]The district court erroneously reviewed all of the Government's actions under the arbitrary and capricious standard. The question whether the Government followed NEPA's procedures for notice and developing a site-specific environmental analysis is reviewed *de novo*. *See Lathan v. Brinegar*, 506 F.2d 677, 692-693 (9th Cir. 1974) (arbitrary and capricious standard applies to substantive determinations by an agency, not to whether the agency followed NEPA procedures). Because we are reviewing the administrative record *de novo* a remand is unnecessary to correct this error.

Appendix A

(1) In all cases the agency shall mail notice to those who have requested it . . . .

(2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter . . . .

(3) In the case of an action with effects primarily of local concern, the notice may include:

(i) Notice to State and areawide clearinghouses . . . .

***

(iv) Publication in local newspapers . . . .

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations . . . .

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property . . . .

40 C.F.R. § 1506.6.

[1] Because the CEQ regulations provide different notice requirements for matters of national, as opposed to local, con-

cern, we must first determine whether the NEXRAD project was of national or local concern. We conclude that NEXRAD contains both national and local components. The general methodology of the NEXRAD project (*i.e.*, use of radio frequency radiation) is of national concern. However, once a site is chosen, the environmental impact of the NEXRAD project on that site is of local concern. Accordingly, the Government's notice of the 1984 PEIS, the 1993 SEA, and the 1993 FONSI must be reviewed under the notice standard developed for matters of national concern as these environmental documents were developed for program-wide use. Conversely, the Government's notice of the 1989 FONSI must be reviewed under the notice standard developed for matters of local concern as this document was developed specifically for Sulphur Mountain.

1.

[2] For matters of national concern, the CEQ regulations mandate notice in the Federal Register and mailed notice to interested national organizations. 40 C.F.R. § 1506.6(b)(2). The Coalition does not contend that the Government failed to provide notice in the Federal Register[4] or that the Coalition is a national organization entitled to notice by mail. Instead, the Coalition argues that the Government had a duty to provide additional notice to Ojai citizens. We disagree. If the CEQ intended to impose additional notice requirements, it would have expressly provided so. In the absence of a legislative mandate, we are not free to impose additional requirements on the Government. *See Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1285-1286 (9th Cir. 1973) (refusing to imply a mandatory duty to hold a NEPA hearing where the regulations provided that NEPA hearings were discretionary, and stating that the court would not "substitute [its] judgment for that of Congress"). We thus conclude that the Government

[4]The record demonstrates that Federal Register notice was provided for the 1984 PEIS, the 1993 SEA, and the 1993 FONSI.

gave adequate notice of the 1984 PEIS, 1993 SEA, and 1993 FONSI.

2.

[3] While the CEQ regulations mandate public notice in matters of local concern, they do not mandate any particular *form* of notice. 40 C.F.R. § 1506.6(b). The methods of notice listed in 40 C.F.R. § 1506.6(b)(3) are merely permissive.

[4] The Government gave notice of the 1989 FONSI by filing it with state and local clearinghouses as provided for in 40 C.F.R. § 1506.6(b)(3)(i). In response to a question at oral argument, the Coalition agreed that the Government had filed all necessary documents with state and local clearinghouses and clarified that the issue on appeal is whether NEPA's requirement of public involvement could be satisfied by merely filing documents with the state and local clearinghouses.[5] The Coalition did not articulate what type of notice it contends the Government was required to provide.

[5] We conclude that, in matters of local concern, NEPA's public notice requirement is satisfied by utilizing any one of the methods listed in 40 C.F.R. § 1506.6(b)(3). We can infer that the CEQ would not list a type of notice that it had concluded was deficient. Moreover, had the CEQ intended to

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[5]The Government did not give separate notice of either the 1986 PSS or the 1987 ISS by any of the methods set forth in 40 C.F.R. § 1506.6(b)(3). The Government's notice of the 1986 PSS and 1987 ISS consisted of a reference to these studies in the Government's 1989 FONSI. In light of the Coalition's narrow statement of the issue on appeal, we do not reach the question of whether the Government gave adequate notice of the environmental assessments contained within the 1986 PSS and 1987 ISS, or if the failure to do so prejudiced the Coalition. *See Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th Cir. 1988) (failure to comply with NEPA's notice requirements did not require an agency decision to be set aside where the violation did not prejudice the plaintiffs).

make actual notice to affected citizens, or notice in the local media essential to ensure public involvement, it would have mandated these actions. Instead, notice to the state and area-wide clearinghouses, actual notice, or media publication were listed as alternative methods of providing notice to the public. The fact that the CEQ regulations expressly mandate the method of notice for matters of national concern demonstrates that the CEQ intentionally chose not to prefer one of the alternative forms of notice over the others for matters of local concern. We are not free to alter or add to the public notice requirements set forth in the CEQ regulations. *Cf. Jicarilla Apache Tribe*, 471 F.2d at 1285-86 (as discussed *supra*). Accordingly, we conclude that Government gave adequate notice of the 1989 FONSI.

B.

The Coalition contends that the Government failed to consider the impact of the NEXRAD installation on the local Ojai environment. The Coalition claims further that the Government's decision not to prepare a site-specific EIS was arbitrary and capricious. We disagree.

[6] The Government fully complied with NEPA by conducting an EA of the Sulphur Mountain site. The site-specific EA in the Preliminary Site Survey for Sulphur Mountain addressed the possible effects of NEXRAD construction and operation on biological resources. The Government found that no significant impact was expected.

> (5) *Flora and Fauna*—The Fish and Wildlife Service list, "Endangered and Threatened Wildlife and Plants," indicates that there are endangered or threatened species within the State of California [USFWS, 1985]. These species are not expected to be found in the vicinity of the proposed site. Confirmation of this opinion has been requested from the U.S. Fish and Wildlife Service.

Appendix A

In a June 15, 1987 letter, the United States Fish and Wildlife Service ("USFWS") stated that the only listed species that may occur at the NEXRAD site is the California condor. In a July 2, 1987 letter, the USFWS provided that:

> Having reviewed the information you have provided on the location of the radar tower, we are of the opinion that Sulfur Mountain and the surrounding area is too developed and urbanized to be seriously considered for future releases of California condors or likely to be of much importance to an established population of condors. We, therefore, do not view the proposed radar tower on Sulfur Mountain as likely to affect the California condor.

Finally, the Government received and relied on an August 26, 1987 letter from the California Department of Fish and Game stating that they were "not presently aware of any state-listed species for these sites." The Government clearly complied with NEPA's requirement that it consider the site-specific impact of the NEXRAD installation on Sulphur Mountain's flora and fauna.

[7] Additionally, the Government addressed the possible effects of the NEXRAD construction on Sulphur Mountain's historic, cultural, and archaeological sites in the site-specific EA. The California Office of Historic Preservation, the University of California, Los Angeles Institute of Archaeology, and the California Archaeological Inventory all issued letters to the Government finding no significant historic, cultural, or archaeological impact due to the NEXRAD construction.

[8] The Government also found in the site-specific EA that the NEXRAD radome was not expected to have a negative effect on the visual quality of the area.

> (7) *Aesthetics*—The visual quality of the area is characterized by the surrounding farmland, scattered

oil wells and residences, and the nearby radio-repeater antenna. The NEXRAD radome will be a prominent feature from a number of locations in the immediate area, including the Kee residence, but is not expected to have a negative effect on the visual quality of the area.

[9] Finally, the Coalition contends that the Government did not consider the issue of RFR from multiple sources including the FM radio antenna in the vicinity. Complaint ¶ 17. The Government did consider the question of "additive RFR" from NEXRAD and other possible sources in its SEA. The SEA concluded that cumulative RFR levels were extremely unlikely to exceed "ultraconservative" health standards. The Government explained that "the emissions from the WSR-88D radar will not materially add to the emissions present in those areas from other sources."

[10] Thus, there is no merit to the Coalition's claim that the Government violated NEPA by failing to prepare a site-specific EIS in relation to any site-specific problems raised by installing the NEXRAD on Sulphur Mountain. The Coalition overlooks the ISS and the PSS and the accompanying EAs, which review any site-specific impact of the NEXRAD installation on Sulphur Mountain in detail and which find no significant impact.

[11] The Government's decision, based on its site-specific EAs, not to prepare a site-specific EIS was not arbitrary and capricious. NEPA does not require an agency to prepare site-specific environmental impact studies for each individual location. *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 373 (1989) ("[I]f an agency is unsure whether a proposed project requires [a] . . . supplemental EIS, federal regulations direct the agency to prepare an environmental assessment on which it may then base its decision"); *Oregon Natural Resources Council v. Lyng,* 882 F.2d 1417, 1421-22 (9th Cir. 1989) (citing 40 C.F.R. § 1501.4(b)-(c)). The pur-

pose of the environmental assessment is to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9. In its 1986 and 1987 site-specific EAs, the Government considered the environmental impact of the NEXRAD installation on Sulphur Mountain. Having determined that the Sulphur Mountain NEXRAD installation would have no significant local environmental impact, the Government reasonably issued a FONSI in 1989 instead of preparing a site-specific EIS.

C.

The Coalition contends that the Government acted arbitrarily and capriciously in issuing a FONSI instead of preparing a SEIS after new research concerning the negative biological effects of RFR became known. In particular, the Coalition claims that the Government failed to consider "[n]umerous peer review studies published after the PEIS . . . [that] have concluded that there is a connection between RFR and cancer, heart disease, Downs [sic] Syndrome, and other diseases and illnesses." Complaint ¶ 14. The Government argues that its decision to forego preparation of a SEIS was not arbitrary and capricious because it was based on a thorough consideration of the relevant issues in its SEA.

This court must uphold the Government's determination that a SEIS was not necessary if that determination was not arbitrary and capricious. *Marsh*, 490 U.S. at 376-77. The Government's decision to forego preparation of a supplement was not arbitrary and capricious if it appears from the record that the Government based its decision on a "reasoned evaluation 'of the relevant factors.' " *Id.* at 378 (internal cite omitted).

The Government published its initial PEIS in 1984. The PEIS concluded that "[i]n general, construction and operation of the NEXRAD [now WSR-88D] system will have no signif-

icant adverse environmental impacts." Since 1984, additional scientific research on the biological effects of exposure to RFR has been conducted. To determine whether this research required it to prepare a SEIS, the Government prepared an extensive SEA. In its SEA, the Government reexamined the "potential bioeffects of RFR and their relationship to human health . . . based on a review of papers selected from the many thousands of accounts published in scientific journals through about mid-1991." The Government also reviewed a comprehensive document prepared for the United States Air Force, entitled *Critique of the Literature on Bioeffects of Radiofrequency Radiation: A Comprehensive Review Pertinent to Air Force Operations.* In assessing the scientific literature, the Government specifically examined recent studies of connections between RFR and cancer, heart disease, and congenital effects including Down's Syndrome. In each instance, the Government found that although initial studies suggested an association between RFR and these diseases, more rigorous subsequent studies either failed to confirm the initial results or yielded negative findings. The Government also examined recent studies regarding the ocular effects, auditory effects, nervous system effects and immunological effects of RFR as well as other impacts such as shock and burn, mutagenesis and teratogenesis. Based on its examination of the scientific literature and studies, the Government concluded "that the RFR from WSR-88D units will be at levels that will not generate adverse health effects in the general population." Accordingly, its previous conclusion that the weather stations would have no significant adverse environmental impact (published in its PEIS) remained valid. Therefore, the Government determined that it was not necessary to prepare a SEIS.

[12] We uphold the Government's decision not to prepare a SEIS. The Government conducted a reasoned evaluation of the relevant information and reached a decision that was not arbitrary or capricious. The record demonstrates that the Government thoroughly evaluated recent scientific developments

regarding the health impact of RFR. Having done so, and having determined based on careful scientific analysis that its initial conclusion remained valid, the Government acted within the dictates of NEPA in concluding that supplementation was unnecessary.

III.

The district court's order granting summary judgment is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JUNE 1, 1994

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 94-164 TJH (RHx)

ENVIRONMENTAL COALITION OF OJAI, *et al.*,

Plaintiffs,

v.

RONALD H. BROWN, *et al.*,

Defendants.

JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

The Court, having granted Defendants' motion for summary judgment,

It is ordered, adjudged and decreed that Plaintiffs take nothing and that each party shall bear their own attorneys' fees and costs.

Date: June 1, 1994

s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

APPENDIX C — RESOLUTION

RESOLUTION

BOARD OF SUPERVISORS, COUNTY OF VENTURA,
STATE OF CALIFORNIA

TUESDAY, FEBRUARY 1, 1994, AT 8:30 O'CLOCK A.M.

RESOLUTION NO. 205

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA DECLARING ITS OPPOSITION TO THE USE AND OPERATION OF THE WSR-88D RADAR INSTALLED ON SULPHUR MOUNTAIN IN VENTURA COUNTY; AND DECLARING ITS SUPPORT FOR THE PLAINTIFFS IN THE RELATED LITIGATION REQUESTING A JUDICIAL DECLARATION THAT THE DEFENDANTS' ACTIONS VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) AND FOR A PERMANENT INJUNCTION OF ANY FURTHER CONSTRUCTION AND OPERATION OF THE RADAR TOWER ON SULPHUR MOUNTAIN UNTIL DEFENDANTS PREPARE AN ENVIRONMENTAL IMPACT STATEMENT (EIS) PURSUANT TO NEPA; AND REQUESTING RELOCATION OF THE RADAR TOWER

WHEREAS, in November 1993, the United States Government installed a Doppler Radar System on Sulphur Mountain in Ventura County near Ojai, California (hereinafter "the radar tower" or "the Project") as part of a new weather radar system, named Next Generation Weather Radar or NEXRAD, developed jointly by the Departments of Commerce, Defense and Transportation, and implemented by the Joint System Program Office ("JSPO") for the purpose of acquiring,

processing, and distributing radar weather information for the United States; and

WHEREAS, the Board of Supervisors of Ventura County welcomes the installation of an advanced design weather radar system in Ventura County and acknowledges the benefits to the public of the associated weather forecasting capabilities; and

WHEREAS, the Project is a Federal Action that is subject to the provisions of the National Environmental Policy Act ("NEPA") which requires preparation of an Environmental Impact Statement ("EIS") if any significant risk to human health or the environment may result from the action, or preparation of a Finding Of No Significant Impact ("FONSI") if no such impact will occur; and

WHEREAS, as a result of the mandate of NEPA and the potential significant health effects of the NEXRAD system, JSPO caused preparation of the following six environmental documents: (1) November 1984, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, Construction and Operation of the NEXRAD Weather Radar System, (2) April 1986, NEXRAD Preliminary Site Survey for the LOS ANGELES, CALIFORNIA AREA (Sulphur Mountain Site), (3) August 1987, Revised April 1993, NEXRAD IN-DEPTH SITE SURVEY REPORT FOR THE LOS ANGELES, CALIFORNIA, AREA (Sulphur Mountain Site), (4) January 29, 1989, FINDING OF NO SIGNIFICANT IMPACT, LOS ANGELES, CALIFORNIA AREA NEXRAD SYSTEM, (5) April 1993, FINAL SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT (SEA) OF THE EFFECTS OF ELECTROMAGNETIC RADIATION FROM THE WSR-88D RADAR, and (6) June 14, 1993, FINDING OF NO

Appendix C

SIGNIFICANT IMPACT, FINAL SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT (SEA) OF THE EFFECTS OF ELECTROMAGNETIC RADIATION FROM THE WSR-88D RADAR; and

WHEREAS, significant issues concerning the radar tower's effects on human health and the environment have been raised in light of the additional scientific research on the biological thermal and non-thermal effects of exposure to radiation in the radio frequency range ("RFR") of the electromagnetic spectrum, conducted subsequent to the November 1984 PEIS, calling into question the adequacy of the site specific FONSI's prepared in January 1989 and April 1993; and

WHEREAS, the federal government has recognized that its relationship with local governments, with respect to the application of local zoning laws and laws relating to the development of real property, is set forth in section 6 of the Public Buildings Amendments of 1988 (P.L. 100-678), which requires, among other things, that the federal government (1) consider local land use laws, including zoning regulations, prior to construction, (2) allow local officials to make recommendations concerning measures which take into account local conditions, and (3) give due consideration to the recommendations made by local officials; and

WHEREAS, both the April 1986 NEXRAD Preliminary Site Survey for the LOS ANGELES, CALIFORNIA AREA (Sulphur Mountain Site) and the August 1987, revised April 1993, NEXRAD IN-DEPTH SITE SURVEY REPORT FOR THE LOS ANGELES, CALIFORNIA, AREA (Sulphur Mountain Site) recognized that the installation of NEXRAD

equipment and facilities would require a Conditional Use Permit issued by the County of Ventura, thereby providing notice and opportunity for local residents to be heard regarding their concerns about the radar tower's location; and

WHEREAS, JSPO did not observe Ventura County's local zoning ordinance which requires a Conditional Use Permit for the Project, thereby depriving the County and affected local residents of sufficient notice and opportunity to review and make recommendations concerning the location of the radar tower; and

WHEREAS, the radar tower is approximately 100 feet high and 38 feet wide, a height over twice the allowable limit for buildings in this Agricultural Exclusive (A-E) zone, and the design of the radar tower is distinctly industrial in appearance while located in an area with rural, residential and agricultural characteristics; and

WHEREAS, the radar tower's close proximity to homes, its large scale and industrial appearance degrade the surrounding visual environment, is incompatible with the character of surrounding land uses, and interferes with the residents' enjoyment of this scenic rural residential area; and

WHEREAS, the local area residents have a legitimate concern for the health of their families, as supported by qualified medical research and findings, thereby depriving them of the peaceful use of their homes; and

WHEREAS, the property upon which the radar tower is located is subject to the Williamson Act, California Government Code section 51200 et seq., which limits the use of such property

to agricultural and compatible uses in order to discourage premature and unnecessary conversion of such lands from agricultural uses, calling into question whether the Project violates California law; and

WHEREAS, had JSPO observed the procedures required by the County of Ventura for obtaining zoning approval, each of the above enumerated issues would have been addressed, and local residents would have been given proper notice and opportunity to be heard regarding the location of the radar tower; and

WHEREAS, JSPO' s failure to observe Ventura County's review procedure for the radar tower prior to its installation prevented the County of Ventura from addressing each of the above enumerated issues and providing recommendations at the appropriate times; and

WHEREAS, JSPO's failure to provide notification of the June 14, 1993 FONSI to the surrounding property owners prevented public participation and informed decision-making by JSPO; and

WHEREAS, there are many uninhabited ridges in Ventura County within the area identified by JSPO as suitable for installation of the radar tower; and

WHEREAS, a geographic location other than the one selected and developed would be more suitable and appropriate, in that it would avoid most, if not all of the above-described adverse effects upon the community and its residents.

NOW, THEREFORE, the Board of Supervisors of the

Appendix C

County of Ventura hereby finds, resolves, determines as follows: that the County of Ventura opposes the use, operation and maintenance of the NEXRAD radar tower on Sulphur Mountain until such time as the federal government causes preparation of an Environmental Impact Statement pursuant to NEPA, which sufficiently addresses the effects of the radar tower on human health and the environment, given the most current medical research data, and until the federal government complies with section 6 of the Public Buildings Amendments of 1988 (P.L. 100-678), by giving due consideration to all local land use requirements, to enable the County of Ventura, and its residents, to participate in the review and approval of the Project at an acceptable location.

The Board of Supervisors further finds, resolves, determines that the Environmental Impact Statement should identify and evaluate alternative sites for the Project and that the radar tower should be relocated to a more remote location.

On motion by Supervisor Kildee, seconded by Supervisor Lacey, the foregoing resolution was passed and adopted on February 1, 1994.

s/ Vickey Howard
CHAIR, BOARD OF SUPERVISORS

ATTEST:

RICHARD D. DEAN, County Clerk,
County of Ventura, State of California,
and ex officio Clerk of the
Board of Supervisors, thereof.

By s/ Roberta Rodriguez
Deputy Clerk

APPENDIX D — RELEVANT STATUTES AND REGULATIONS

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy

thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer, Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1391

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought —

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 2201

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, [26 USCS § 7428] a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355 or 360b].

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28 U.S.C. § 2202

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 4331

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [42 USCS

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§§ 4321 et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible; (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

40 CFR § 1502.1

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and

alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 CFR § 1506.2

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of state-wide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those for Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

40 CFR § 1506.6

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public

meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

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(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is;

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

40 CFR § 1508.27

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

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(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or

may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.